Supreme Court, U.S.
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No. 87-571

In the Supreme Court

OF THE

United States

October Term, 1987

In re: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION, M.D.L. 150

CITY OF LONG BEACH AND STATE OF CALIFORNIA,
Plaintiffs-Petitioners,

vs.

THE TEMPORARY EMERGENCY COURT OF APPEALS
EXXON CORPORATION,
MOBIL OIL CORPORATION,
SHELL OIL COMPANY,
CHEVRON CORPORATION,
(formerly STANDARD OIL COMPANY OF CALIFORNIA),
TEXACO INC., and
UNION OIL COMPANY OF CALIFORNIA,
Defendants-Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI, MANDAMUS AND PROHIBITION TO THE TEMPORARY EMERGENCY COURT OF APPEALS

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI, MANDAMUS AND PROHIBITION TO THE TEMPORARY EMERGENCY COURT OF APPEALS

The questions posed by Respondents are not the questions raised by the record.

I.

A WRIT SHOULD ISSUE FROM THIS COURT TO RESOLVE THE JURISDICTIONAL IMPASSE

Respondents concede that Petitioners are trapped in a jurisdictional impasse between TECA and the Ninth Cir;

cuit if the Ninth Circuit's stay remained effective until TECA decided that it had " 'jurisdiction over the' *Causation Issue.*" (Emphasis added). Respondents' Brief at 7, n.4. Respondents miscite the Ninth Circuit's Order. In fact, the Order says nothing about the "Causation Issue." The sentence quoted, in part, by Respondents, states in full text:

> A decision by TECA on whether it has jurisdiction over the *Price Ceiling issue* will determine whether this issue shall be briefed in this Court.

(Petition, E-1).

The jurisdictional dilemma continues for three reasons:

(1) TECA has not decided the merits of the price ceiling issue over which, as the Ninth Circuit has earlier decided, TECA has exclusive jurisdiction; instead, it has refused to decide on the grounds that this issue is either non-justiciable or moot because it would become moot if the Ninth Circuit affirms the latest district court Order granting summary judgment on the grounds that the extensive record failed to create a triable issue of fact on the existence of a conspiracy to fix prices.

(2) Even if TECA decided that the price control ("Neeb issue") is within the Ninth Circuit's exclusive jurisdiction, the Ninth Circuit is not bound by that holding. Respondents' attempt to distinguish *Christianson v. Colt Industries Operating Corp.*, 822 F.2d 1544 (Fed. Cir. 1987) is unsuccessful.

Although the federal circuit has case jurisdiction and TECA has issue jurisdiction, the relevant principle is the same. One appellate court's decision that another appellate court has exclusive jurisdiction is not binding on the other appellate court. The Ninth Circuit has already made

a preliminary determination that TECA has jurisdiction over the Neeb issue. (Petition, D-1).

(3) There is a de facto stay of Petitioners' Ninth Circuit Appeal because the Ninth Circuit motions panel has not resolved the issues to be briefed. The appeals have been pending before the Ninth Circuit for more than eighteen months and motions as to which issues should be briefed have been submitted more than fourteen months ago.

A. TECA Has Exclusive Jurisdiction Over The Neeb Issue.

If Neeb had no authority to cut off Petitioners' antitrust rights under the statutory scheme of the Economic Stabilization Act of 1970, ("ESA") and the Emergency Petroleum Allocation Act of 1973, ("EPAA"), or, if such authority existed and Neeb did not purport to exercise it in his letter of April 12, 1972 (Petition, G-1, 2), Neeb's actions are irrelevant to the antitrust case. His action in writing the letter would have no causal connection with Petitioners' antitrust claims. His letter would be no more probative than a piece of Mr. Neeb's social correspondence.[1]

Respondents concede that TECA's exclusive jurisdiction applies to 'cases and controversies' arising under the federal price controls statutes, ESA, EPAA and their implementing regulations. Respondents' Brief, 10. Whether Neeb had the requisite authority to cut off Petitioners' antitrust rights and whether he purported to

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[1]The district court's ruling that the Neeb letter cut off Petitioners' antitrust rights runs directly contrary to the legislative and executive scheme which explicitly provided that price controls were not to defeat preexisting antitrust rights.

act pursuant to that authority can be resolved only by examining ESA, EPAA and their implementing regulations. Thus, TECA's jurisdiction must necessarily be invoked to resolve the Neeb issue.[2]

Petitioners have not asked TECA to decide any antitrust question. Rather, they have appealed to TECA to resolve the threshold question of whether price controls statutes gave Neeb any authority to cut off Petitioners' antitrust rights based on Respondents' conduct occurring before price controls were instituted and to decide the Exemption and Phase III Issues, which, as Respondents concede, are within the exclusive jurisdiction of TECA. Petitioners did not invite the Neeb error, nor are they responsible for intertwining the antitrust and price control issues. To the contrary, Respondents led the district court into the Neeb error, and the statutes allocating appellate jurisdiction between TECA and the Court of Appeals require Petitioners to file appeals in both courts.

B. The Neeb Issue Is Ripe For TECA's Determination, And the Issue Is Neither Moot Nor Non-Justiciable.

As Petitioners pointed out in the Petition, this Court has decided that writs will issue requiring lower courts to decide justiciable issues within their jurisdiction. *Ex parte Kumezo Kawato*, 317 U.S. 69 (1942). A court cannot avoid deciding justiciable issues because they might become moot at some later time, *e.g., United States v. Sharpe*, 470 U.S. 675 (1985).

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[2]Respondents purport to find a proximate cause ruling in *Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922), despite the fact that no decision construing *Keogh*, including this Court's recent decision in *Square D v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), has ever found a proximate cause ruling in *Keogh*.

Respondents' argument that the price controls issues are moot until the Ninth Circuit reverses the district court on the antitrust and MOIP summary judgments is unsupported by any authority. The authorities are to the contrary. TECA should now decide the live issues that are within its exclusive jurisdiction.

No waste of judicial resources is involved. Congress has decided that issues within TECA's exclusive jurisdiction are to be decided by that court, even if other aspects of the appeal are pending before a court of appeals. If, as Petitioners have contended before TECA, the Neeb letter was outside of his authority and irrelevant to the antitrust controversy, the partial summary judgment based on that ground must be reversed, and that issue disappears from the case. Even Respondents admit that the Neeb issue will have to be decided if the Ninth Circuit overturns either the district court's antitrust or MOIP summary judgments.

II.

RELIEF BY WRIT IS APPROPRIATE AND IS THE ONLY AVAILABLE REMEDY

Neither the Ninth Circuit nor TECA has resolved the jurisdictional impasse. Neither can effectively decide the other court's appellate jurisdiction. No court can referee the jurisdictional badminton game except the Supreme Court. The precise factual context in which the jurisdictional dilemma arises is unlikely soon to recur, although the resolution deeply affects these litigants. The broader issues posed by the petition, however, not only can but are recurring each time two different federal appellate courts have jurisdiction to decide a case in which general and specialized jurisdictional issues are intertwined, *e.g.*, *Christianson v. Colt Industries Operating Corp.*, *supra*, 822

F.2d 1544. Furthermore, the very fact that these litigants have been caught in a jurisdictional whipsaw invokes this Court's supervisory powers over the entire federal judicial system to prevent frustration of an orderly appellate process. Both the Ninth Circuit and TECA have been reluctant to tackle the issues raised in this marathon litigation. The parties are entitled to have their claims adjudicated by the two courts which Congress has assigned that responsibility.[3]

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[3]Petitioners have requested the amendment of the Petition to name TECA as the "Persons Against Whom Relief Is Sought", and the TECA Panel has been served.

WHEREFORE, Petitioners respectfully request that their Petition for Writs of Certiorari, Mandamus and Prohibition to the TECA Panel should be granted and the judgment of TECA should be vacated or reversed.

DATED: November 13, 1987

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On November 13, 1987, I served the within REPLY BRIEF in re: "City of Long Beach and State of California vs. Exxon Corporation, Mobil Oil, Shell Oil, Chevron, Texaco Inc. and Union Oil" in the United States Supreme Court October Term, 1987, No. 87-571.

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All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on November 13, 1987, at Los Angeles, California.

CE CE MEDINA